No. 97-500

Supreme Court, U.S.
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In The

Supreme Court of The United States

October Term, 1997

RICHARD ZELMA individually and on behalf of SHAWNE L. for the appointment of a guardian ad litem,

Petitioners,

ANDREW LEVINE, *Plaintiff,*

- against -

DONNA McLEOD, INDIVIDUALLY OR AS A STATE ACTOR; COUNTY OF WESTCHESTER; OFFICE OF THE DEPARTMENT OF SOCIAL SERVICES OF WESTCHESTER COUNTY; OFFICE OF CHILD PROTECTIVE SERVICES OF OSSINING, NY; OFFICES OF THE COUNTY ATTORNEYS OF WESTCHESTER, NY; ATTORNEY GENERAL OF THE STATE OF NEW YORK; JEWISH COMMUNITY SERVICES; MS. MARIA JOY FRANK, INDIVIDUALLY OR AS A STATE EMPLOYEE; HONORABLE ORAZIO BELLANTONI, NOMINALLY IN HIS CAPACITY AS FAMILY COURT JUDGE OF WESTCHESTER COUNTY; HONORABLE VINCENT COLABELLA, NOMINALLY IN HIS CAPACITY AS A SUPREME COURT JUDGE OF THE STATE OF NEW YORK; HONORABLE CHESTER DAVIS, NOMINALLY IN HIS CAPACITY AS A JUDGE OF THE DISTRICT COURT OF COUNTY OF FORSYTH; AND DOES 1 THROUGH 25,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF

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No. 97-500

In The
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Richard Zelma individually and on behalf of Shawne L. for the appointment of a guardian ad litem ,

Petitioners

Andrew Levine, Plaintiff

v.

Donna McLeod and the County of Westchester, et.al.,

Respondents

SUPPLEMENTAL BRIEF IS TIMELY

The petition for certiorari in the case at bar was filed on September 15th 1997, and docketed on September 19th 1997. [# 97-500]. The matter is pending. On October 14th 1997, this court heard arguments in the case entitled *General Electric* v *Joiner*. [# 96-188]. On September 11th 1997, the Seventh Circuits ruling in *Brophy* was rendered. *[T.W.* v *Brophy*, 1997 WL 564104, __ F. 3d. __ (1997)]. These cases are new to support the filing of this supplemental brief. [Rules of the Supreme Court ¶ 15.8.].

SUPPLEMENTAL POINTS IN SUPPORT OF PETITION FOR CERTIORARI.

I. THE FACTS DO FIT THE STANDARD FOR ADMISSIBILITY UNDER *DAUBERT*. THE **JOINER** CASE, ARGUED BEFORE THIS COURT ON OCTOBER

14TH 1997, IS NEW AND GERMANE TO THE ADMISSIBILITY OF "JUDICIALLY NOTICEABLE" EXPERT FINDINGS. THIS IS PROBATIVE TO THE CASE AT BAR FOR THE ISSUE OF SANCTIONS, AND FOR RESTORING THE CASE ON BEHALF OF THE CHILD.

What is crucial to note is that the Family Court on July 10th 1987, specifically admitted in open court that the biological father could not have raped the child, as she had testified to at the in camera hearing on that date. This was because of the medical finding by the child's doctor on December 2nd 1986, and as a result of the biological father complying with court orders of restraint as of December 1st 1986. ["C" ¶ 4 at App.* 144]. [1] The complaint of July 8th 1992, [¶ 44 at App*. 153], set forth, in part, the relevant decision rendered from the bench on July 10th 1987:

> 44: "There was a stipulation that if Dr. Robert Schwartz were to testify and was called as a witness, that he would testify as to the information in his report. This is important, because I must make a finding as to what acts under the penal law, were committed as far as rape goes. I know that she did indicate that when questioned by the Law Guardian on the in camera interview that *daddy* put his penis in her vagina and it hurt, but there was an examination after the alleged incident occurred, and as far as any sexual intercourse is concerned.... there was no evidence of any kind of sperm in the vagina area or there was no evidence of penetration, so with respect to the finding of rape I will rule it out."[emphasis added "C" 44 at App*. 153; and App* 47-48].

Mr. Belvedere Esq., submitted several affidavits stating that at no time did the child ever identify anyone by name at the in camera hearing of July 10th 1987. ["A" 52-56]. The Family Court judge never indicated or suggested

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[1] "C" refers to the third amended complaint dated July 8th 1992. App* refers to record from # 96-7747. "A" refers to appendix in the petition for certiorari.

that the child identified anyone by name at the in camera hearing, or at any other time. [App.* 37-51].

The relevant point from The Handbook of Clinical Intervention by Dr. Sgroi, are that clinical findings demonstrate that sexual abuse "progresses" from a mild form; to a physical form; with it culminating in actual "vaginal penetration". This is "predictable". In paragraph 71 of the July 8th 1992 complaint, the findings of Dr. Sgroi are set forth in specific detail:

> (2) The engagement phase does encompass a *progression* of equal activity. [App.* at 158-160, citing Handbook of Clinical Intervention page 15].
> (4) *It is very helpful to think of sexual abuse on a continuum over time*. [*id* at p. 17].
> (5) The *progression* of exposure to fondling to some form of penetration is very predictable. [*id* . at p. 15].
> (6) Secrecy is essential. The perpetrator must persuade or pressure the child to keep their activity a secret over time. [*id*. at p. 16]
> (8) Family members are often aware of abuse and partake in the secret. [*id*. at pages 357-358].
> (12) Accidental Disclosure. In this type of disclosure, the secret was revealed accidentally, because of external circumstances. The key factor here is that none of the participants decided to tell the secret. Instead the secret was revealed in one of the following ways:
>
> > (a) Observation by a third party. Someone else observes the participants and tells someone else.
> > (b) Physical injury to the child. When this occurs, it is usually not intentional. However, the signs of the injury draws outside attention to the sexual behavior. [*id*. at page 90 emphasis added]."

This is precisely what the evidence from the underlying 1987 hearing establishes. The child's statements

to the investigators and former law guardian, from December 5th 1986-April of 1987, demonstrates a progressive abuse with it worsening over time. It further demonstrates a secrecy being imposed. Thereafter, on July 10th 1987, the child for the first and only time, testifies to actual vaginal penetration by a "daddy".

Of significant evidentiary import, is that the child was taken to the emergency ward at a local hospital for physical injuries that she had sustained. This was on December 26th 1986. ["C" ¶ 6 at App.* 144-145]. The physical and verbal abuse taking place before the nurses on duty at this hospital, was documented. [*id.*]. The person causing the abuse and who accompanied the child to the hospital was arrested that day. Here lies the "accidental disclosure" that Dr. Sgroi speaks of in her clinical handbook. Subsequently, appellee McLeod arrested the same stepfather on July 2nd 1987. [App* 233a - 234a].

The facts elicited from the child over a "continuum", coupled with the clinical findings of Dr. Sgroi, fully support a viable cause of action under the Child Abuse Prevention and Treatment Act. This is for the immediate "investigation and prosecution" of the perpetrator, who allegedly raped and otherwise sexually abused the child from December 1986 through July of 1987. [42 USC 5106a(b)(2) and 5106c(b)(1) & 5106g (7) (B); Point I & II of petition for certiorari]. This especially holds true when appellees were notified on December 7th 1987, by medical professionals, of this probability. They were made aware that to ignore this, would increase the harm to the child. [page 9 of petition for certiorari].

Petitioner had at all times relied on the *Clinical Handbook of Child Abuse by Dr. Suzanne Sgroi*. This is a published book on the subject and was "judicially noticeable" by the New York Court of Appeal as the leading authority on the subject in 1989. [*Matter of Nicole V.* 71 NY 2d 112, at 121 (1989) "C" 70 at App. * 158 citing Handbook of Clinical Intervention in Child Sexual Abuse, by Dr. Sgroi, (1982); quote from *Daubert* v *Merrell Dow*, 509 U.S. 579, at 598 (1993) Rhenquist and Stevens J.J.

concurring in part and dissenting in part].

The facts are not "undisputed" as the trial court held in its decision of January 31st 1996. ["A" 25 at page 13 of petition for certiorari dated September 11th 1997 citing *Levine v County of Westchester*, 164 F.R.D. 372 (S.D.N.Y. (1996)]. The allegation that the child was raped and otherwise sexually abused by her stepfather from December 1986 through July 10th 1987, has at all times been the core to the dispute. The medical clinical findings of Dr. Sgroi are admissible. [*Daubert* v *Merrell Dow*, 509 U.S. 579, at 593-594, (1993); FRE 702 & 803 (18) and (24)].

This courts ruling in *Daubert* has at all times been relied upon by petitioner. [see i.e. App. * 334 proposed petition for certiorari dated August 8th 1994]. In 1994, it was noted that the clinical findings from Dr. Sgroi would be relevant and admissible to all members of this court. [App*. 334 citing *Daubert* v *Merrell Dow*, *supra* at 598.]. The "scientific knowledge" of Dr. Sgroi, supports the " inference or assertion" or allegation, that the child was sexually abused with it culminating in actual vaginal penetration. [*Daubert* v *Merrell Dow*, 509 U.S. 579 at 590 (1993)]. The published handbook and clinical findings " assist the trier of fact to understand the evidence or to determine a fact in issue." [*Daubert id*. at 591 quoting FRE 702]. When one links the testimony of rape of July 10th 1987, with a person merely identified as a "daddy", the federal statutory right for an "investigation" and prosecution of the alleged perpetrator, under ¶ 1983, is actionable. [2] [See 42 U.S.C. ¶ 5106a (b)(2); see Point I, II, & III of petition for certiorari docketed September 19th 1997, # 97-500].

This courts ruling in Joiner may be highly probative. [*General Electric Co.* v *Joiner*, cert. granted, 117 S. Ct. 1243, (1997), docket # 96-188, argued October 14th 1997; appealing *Joiner v General Electric* 78 F. 3rd 524 (1996)].

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[2] The clinical handbook was ignored and returned to petitioner by the trial court in 1992.

Petitioner maintains that the alleged facts had full evidentiary support. This is a complete defense under FRCP 11. [see FRCP 11 (b) (3) as amended 1993]. It further supports the point that there was a viable federal cause of action under 42 USC 5106a(b)(2), which is enforceable under ¶ 1983 for the third party beneficiaries. [see Points I; II; and III of petition for certiorari].

II. PETITIONER DOES HAVE PROPER STANDING TO PRESENT THE FACTS OF THIS CASE ON BEHALF OF THE SUBJECT CHILD. UNLIKE THE SEVENTH CIRCUIT COURT'S RECENT DECISION IN *T.W.* V. *BROPHY*, PETITIONERS APPEAL IS "CONCRETE", NOT AN "IDEOLOGICAL STAKE". THE APPOINTMENT OF A GUARDIAN AD LITEM IS WARRANTED.

The new case law rendered by the Seventh Circuit on September 11th 1997, discusses whether a party can bring a case on behalf of a child as her "next friend". [cf. *T.W.* v *Brophy*, 1997 WL 564104, __ F. 3d. __ (CA7)]. The Seventh Circuit relied in part on this court's opinion of 1990, in its discussion of FRCP 17 (c). [*Whitmore* v *Arkansas*, 495 U.S. 149 (1990)].[3]

The case at bar is unlike *Whitmore*. The injury to petitioner is not "too speculative to invoke the jurisdiction of an Art. III court". [Cf. *id*. at 157 (1990)]. There was no definitive positive result for petitioner Whitmore, had his argument benefited the 3d party prisoner Simmons. In the present case, the opposite is true. If the complaint and appeal were properly based upon relevant admissible facts, and accurately relied upon "existing law", then, this would be both a defense to sanctions for petitioner, and directly support the restoration of the case for the real party of

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[3] However, the Seventh Circuit affirmed the dismissal of the federal complaint based upon the attack of the state court judgment of custody. The Circuit Court dismissed the appeal based upon this "independent ground". [Cf. petition for certiorari to this court pages 9-12].

interest, Shawne L. [cf. *Whitmore, id.* at 157].

Moreover, the complaint was brought on the-child's behalf with full authority from the biological father to do so. ["A" 65-66, correspondence from Levine dated April 13th 1994]. And, of significant import, is that there is *a conflict of interest* present at bar, between the child and appellees. It is alleged that all of the sexual abuse only transpired after the restraining orders were obtained, and that each of the appellees had duties to investigate this premise once they were informed by medical professionals on the subject. This conflict reached its peak when the former law guardian submitted an arguably false affidavit to the district court on August 4th 1992, claiming that the child had identified Mr. Levine by name on July 10th 1987. [App. * 254 § 13 re: affidavit of appellee Frank]. This was not supported by the former law guardian's own previous statement made on July 10th 1987, when she stated that the child was "somewhat vague". [see petition for certiorari page 7]. Indeed, this was refuted on numerous occasions by a person having personal knowledge of the events at that very *in camera* hearing. [see affidavits of Mr. Belvedere Esq. attached to petition for certiorari at "A" 52-56].

The appointment of a guardian ad litem was initially requested in the complaint of July 8th 1992. This same request was subsequently made through a cross-motion by petitioner on December 31st 1994.[4] [App.* 403]. Such an

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[4] " The case was abandoned by Mr. Levine on July 15th 1994. The lower court rendered its order regarding this issue on December 22nd, not November 29th 1994, as it states in its decision." [see Point VII page 52 of Main Brief to Circuit Court dated January 21st 1997; please see page 13 of petition for certiorari and "A" at page 19]. Moreover, the motion for sanctions was filed on December 14th 1994. [App.* 425]. Thus, it is of legal import that petitioners motion[s] were filed on December 31st 1994. It would not have been timely for a re-hearing, had the order respecting the date of abandonment been filed on November 29th 1994. However, it was filed within 10 days of December 22nd 1994. [FRCP 59 (b) "A"28-29]. The cross-motion to sanctions for the appointment of a guardian ad litem, and for consolidation, was furthermore timely, as it was within 20 days of

appointment is fully supported by the Seventh Court ruling of September 11th 1997 when a "conflict of interest" is raised; as well as the 5th Circuit when it found that such an appointment was a constitutional "predicate". [see *T.W.* v *Brophy*, 1997 WL 564104, __ F. 3d __, citing *In re Chicago, Rock Island & Pacific R.R.*, 788 F. 2d 1280, 1282 (CA7) (1986); and please see *Chrissie F. I*, 883 F. 2d 25 (CA5) (1989) & *Chrissie F.* v *Miss. Dep't of Public Welfare*, 995 F. 2d 595. at 599 (1993) cert. denied, 114 S. Ct. 472 (1994); at page 29 of petition for certiorari].

It appears that the child's rights for the appointment of a guardian ad litem are properly presented for this court's consideration. She was at all times brought to the courts attention through her biological father. There was no decree of custody by a state court on July 8th 1992. [see petition for certiorari pages 9-13]. She is legally disabled. She is the real party of interest. Her "independent" rights are fully supported by reliable admissible evidence and cannot be abandoned. [see Point IV pages 29-30 of petition for certiorari dated September 11th and filed September 15th 1997].

It is the petitioners "work product" that seeks to protect her. In addition, it as an affirmative defense to the question of whether the case was frivolous and or with merit. The request for the appointment of a guardian ad litem on the child's behalf was at all times made. It was a question presented in the proposed petition for certiorari of August 8th 1994. [see App.* 317 question # 6]. It is a question that is now presented as well. [question # 7 to petition for certiorari docketed September 19th 1997]. It is error to dismiss the case with prejudice against the child. This is of significant import. And, it is error to punish conduct that is

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December 14th. [FRCP 12 (a) & (g)]. These motions were never addressed by the trial court. No notice of appeal could have been filed. [FRAP 4 (a) (4) (iv)]. The biological father abandoned the case and child on July 15th 1994. Petitioner was unable to file a petition for certiorari to this court on August 8th 1994 on behalf of the child. This was readily acknowedged by the trial court on May 5th 1995. [App.* 117 lines 4-12].

proper; legal; and fully supported by existing law when it was initially brought. This is in sharp contrast to the ruling by this court. [*BMW* v *Gore Jr.*, 116 S. Ct. 1589, (1996)].

The "reasonable inquiry" in making certain that the facts are "well grounded", coupled with the proper analysis of the statutory language and case authority, each of which are defenses for purposes of FRCP 11, is intertwined with the rights of the child herself and whether there was a proper cause of action brought on her behalf. It appears that petitioner has legal standing, as set forth by this court. [*Whitmore* v *Arkansas*, *supra. at 163-164* (1990)].

As was set forth in Point IX to the petitioners brief to the Circuit Court on January 21st 1997:

> The "work product" by appellant as exemplified by the August 8th 1994 proposed petition for certiorari, does fit the legal definition for such status, as it was exclusively prepared in anticipation for further litigation. The child is still entitled to its protection. [See i.e. *Griffith* v *Davis*, 1995 WL 361063, 161 F.R.D.687 (1995)]. The proposed petition for certiorari was exclusively prepared "for litigation". It fulfills the requirements of FRCP 26 (b)(3). [Cf. *In Re Bairnco Corporation Securities Litigation*, 148 F.R.D. 91, 102-103 (S.D.N.Y. 1993); also see *Westinghouse Electric Corp.*, v *Republic*, 951 F. 2d 1414, at 1428 (1991) (CA3), App[*] 470-474]. As has at all times been made clear, appellant would not have commenced this action but for the child. There can be no argument that appellant has waived its disclosure. It remains to be a part of litigation which was at all times brought on the child's behalf. [i.e. *Samuels* v *Mitchell*, 155 F.R.D. 195, 200-201 (N.D. Cal. 1994)].

[see Point IX pages 54-55 of Main Brief to Circuit Court dated January 21st 1997].

CONCLUSION

As the justices of this court have stated: *"Differences in circumstances beget differences in law."* [*Jackson* v *Metropolitan Edison Co.* 419 U.S. 345 at 358 (1974) citing *Burton* v *Wilmington Pkg. Auth.*, 365 U.S. 715 at 726 (1961)]. *"One may call it a question of fact if one will, for it is from the fact that law emerges. Ex Facto jus oritum."* [See *The Paradoxes of Legal Science*, *by* Cardozo, published (1928) by Columbia University Press page 24, 25]. *"It is familiar that what is due process of law depends on the circumstances. It varies with the subject and necessities of the situation."* [*Moyer* v *Peabody*, 212 U.S. 78 at 84 (1909) Justice Holmes].

It is respectfully requested that the petition be granted and a writ of certiorari be issued.

Dated: New York N.Y.

Respectfully submitted,

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October 14th 1997